chinery of the government should be put in motion, must be lodged somewhere. It is an historical fact that the attorney-general has always had control of public prosecutions in England,[13] and in this country, except where such control has been diminished by statute.[14]

C. R. M.

DOMESTIC RELATIONS

Rebutting the Presumption of Legitimacy—Divorce for Fraudulent Contract.

The parties in the case first became acquainted sometime during the spring of 1937; the plaintiff, a man, claiming the first meeting was May 18; the defendant, a woman, claiming it was March 29. A week after their first meeting they engaged in illicit sexual relations. Pregnancy resulted, and the defendant later brought a bastardy charge against the plaintiff. Rather than stand trial on the charge, he married her in October. On the following January 4, a child was born to the defendant which according to the attending physician had been conceived approximately March 31. The plaintiff, believing he was not the father of the child, sought a divorce on the grounds of fraudulent contract, a statutory ground in Ohio,[1] claiming the defendant had fraudulently secured the marriage by declaring him to be responsible for her pregnancy. The common pleas court found that the plaintiff was not the father of the child, and granted a divorce. The defendant appealed. *Held*: Reversed. When a man, who has had illicit relations with a woman, marries her, knowing at the time she is pregnant, he is conclusively presumed to be the father of the child, and a divorce cannot be obtained on the ground of fraud. *Kawecki* v. *Kawecki,* 67 Ohio App. 34, 21 Ohio Op. 76 (Court of Appeals of Lucas County 1941).

In Ohio, every child born during lawful wedlock is presumed to be legitimate.[2] Before the plaintiff can prove that the defendant's representation respecting the paternity of the child was fraudulent, he must overcome this presumption. However, in the principal case

[13] Howard, Criminal Justice in England p. 37; 3 Encyc. Brit. 63; 3 Bl. Comm. 27.
[14] Booth v. Fletcher, 101 F. (2d) 676 (App. D. C. 1938).
[1] Ohio Gen. Code, Sec. 11979.
[2] Powell v. State, 84 Ohio St. 165, 95 N. E. 660 (1911).

the court relied on the doctrine of *Miller* v. *Anderson*[3] that when a man marries an expectant mother with full knowledge of her condition, he is *conclusively* presumed to be the father of the child. It seems the court made an unfortunate choice of terms in calling it a "conclusive presumption" rather than merely a strong presumption. If the plaintiff could show by clear and convincing proof that access to the defendant was impossible during the period of conception,[4] or that he was impotent,[5] any presumption that he was the father would be rebutted. Within the last decade the American courts have begun to follow the view of the European courts that blood tests may rebut the presumption of paternity.[6] Statutes in Ohio, New York, and Wisconsin authorize the use of blood tests in paternity cases,[7] the Ohio statute authorizing the use of the Landsteiner-Bernstein blood grouping test as evidence of non-paternity, not only in a bastardy proceeding, but also "whenever it is relevant in a civil or criminal proceeding to determine the paternity or identity of any person."[8] The Ohio courts have utilized this statute in several recent decisions,[9] so that if the plaintiff had had blood grouping tests taken here which positively showed that he was not the father, it would similarly have rebutted the presumption of legitimacy. Although the case of *Miller* v. *Anderson* has not been specifically overruled, two recent decisions[10] seem to hold that the presumption is no longer "conclusive," but only a strong presumption which is rebuttable.

Assuming the presumption of legitimacy is overcome, plaintiff must still show fraud sufficient to vitiate the marriage as a fraudulent contract. Considerable conflict exists as to what constitutes such fraud. Most courts are convinced that the marriage contract should

[3] 43 Ohio St. 473, 3 N. E. 605 (1885).

[4] Powell v. State, 84 Ohio St. 165, 95 N. E. 660 (1911).

[5] Seig v. State, 1 Ohio L. Abs. 814 (1923).

[6] Commonwealth v. Zammarelli, 17 Pa. Dist. and Co. Rep. 229 (1933); State v. Welling, 6 Ohio Op. 371, 22 Ohio L. Abs. 448 (1936); State v. Wright, 69 Ohio App. 191, 17 N. E. (2d) 428 (1938). For an excellent discussion on blood grouping tests, *see* (1936) 2 OHIO ST. L. J. 203.

[7] N. Y. Civil Practice Act, sec. 306-a, N. Y. Laws 1935 c. 196; 1935 WISC. LAWS, c. 351; OHIO GEN CODE, sec. 12122-1, 12122-2.

[8] OHIO GEN. CODE, sec. 12122-2.

[9] State v. Wright, 59 Ohio App. 191, 17 N. E. (2d) 428 (1938); State v. Welling, 6 Ohio Op. 371, 22 Ohio L. Abs. 448 (1936); *see* (1938) 6 OHIO ST. L. J. 200.

[10] Craner v. State, 21 Ohio L. Abs. 261, 262 (1936), in which the court says that if the marriage had taken place before the child was born an *almost* irrebuttable presumption would arise; State v. Oldaker, 28 Ohio L. Abs. 495, 496 (1938), in which the court said that the presumption is not *conclusive,* but avoided overruling *Miller* v. *Anderson, supra,* note 3, by holding the presumption inapplicable because the parties had separated before the child was born.

be permanent and not avoided for trivial causes. But a bride's concealment of pregnancy by another man from a bridegroom having had no prenuptial intercourse with her is, according to the vast majority of American courts, sufficient fraud to vitiate the marriage contract.[11] In such cases the court will decree a divorce or grant an annullment according to the statutory provisions in the jurisdiction. The only Ohio decision on this situation follows the majority.[12] Two reasons are often given to support this rule:[13] (a) A woman who is incapable of bearing a child to her husband because of her pregnancy by another man is unable to perform part of the contract into which she enters, and any representation that leads to the belief that she is in a marriageable condition is a false statement of a material fact, and is sufficient fraud to declare the marriage void. (b) Public policy favors annulment as it would be very harsh to force a spurious offspring upon the innocent husband.[14] The English rule until recently refused any relief despite the hardship it might cause the innocent husband.[15]

On the other hand when the husband himself has had prenuptial intercourse, and seeks a divorce because his wife has fraudulently represented that she is pregnant by him when she is actually pregnant by another or because she entirely concealed her pregnancy by another, the courts of the United States are in conflict as to whether or not they should grant the husband any remedy.[16] The only Ohio case on this situation refused a divorce.[17] The courts refusing relief often support their decision with two reasons:[18] (a) "The plaintiff can have no standing in a court of equity, or he is *particeps criminis*

[11] Morris v. Morris, Wright 630 (Ohio 1834); Reynolds v. Reynolds, 3 Allen 605 (Mass. 1862); Hardesty v. Hardesty, 193 Cal. 330, 223 Pac. 951 (1924), in which it was held that the fact that the woman herself was ignorant of her pregnancy would not prevent it from being fraud; L. R. A. 1916E 650.

[12] Morris v. Morris, Wright 630 (Ohio 1834).

[13] Reynolds v. Reynolds, 3 Allen 605 (Mass. 1862).

[14] *Ibid.*, at p. 610.

[15] Moss. v. Moss, (1897) P. 263, 66 L. J. (Probate) N. S. 154. *But see* Matrimonial Causes Act, 1937, 1 EDW. 8 and 1 GEO. 6, sec. 7 (d) which makes this holding obsolete.

[16] For divorce or annulment—Gard v. Gard, 204 Mich. 255, 169 N. W. 908 (1918); Jackson v. Ruby, 120 Me. 391, 115 Atl. 90 (1921); Wallace v. Wallace, 137 Iowa 37, 114 N. W. 527 (1908); *contra:* Safford v. Safford, 224 Mass. 392, 113 N. E. 181 (1916); Long v. Long, 77 N. C. 287, 24 Am. Rep. 449 (1877); Creshore v. Creshore, 97 Mass. 330, 93 Am. Dec. 198 (1867); Arno v. Arno, 265 Mass. 282, 163 N. E. 861 (1928); Foss v. Foss, 12 Allen 26 (Mass. 1866); Seilheimer v. Seilheimer, 40 N. J. Eq. 412, 2 Atl. 376 (1885).

[17] Huber v. Huber, I Iddings Term Rep. (Dayton, Ohio 1899).

[18] Vanneman, *Annulment of Marriage for Fraud* (1925) 9 MINN. L. REV. 407, p. 502.

with the defendant." [19] (b) "The plaintiff is precluded relief due to his own credulousness or imprudence." [20]

Similarly, where the woman represents herself as pregnant by a man with whom she has had prenuptial intercourse, when in fact she is not pregnant at all, the courts usually refuse any remedy,[21] because, as the court said in *Fairchild* v. *Fairchild*,[22] "they are equally abominable and filthy in the eyes of the law." A clearer case would be that in which the woman honestly believed she was pregnant, and only after the marriage discovered she was not, for here there would be not a question of fraudulent representation but only innocent mistake. The court would probably refuse relief.

The principal case seems to be well decided because the plaintiff has failed to overcome the presumption of legitimacy, and the fraud was not sufficiently proved to satisfy the requirements of the statute.

J. R. C.

EQUITY

EQUITY—EQUITABLE RELIEF AGAINST POLICE INTERFERENCE WITH BUSINESS

Plaintiff, stipulating that he is the owner of a restaurant in the City of Warren, seeks to enjoin the defendants from stationing police officers in his place of business. The case was appealed on questions of law and fact to the Court of Appeals of Trumbull County from the Court of Common Pleas of that county. During the year of 1938, there were ten arrests and convictions for exhibiting gambling paraphernalia in the plaintiff's restaurant. Officers were kept in plaintiff's place of business from about Nov. 28, 1938, until Dec. 8, 1938, continuously from the time that the restaurant opened in the morning until it closed in the evening. The plaintiff claims that his property and civil rights have been invaded by the actions of the defendants and that such an invasion constitutes a continuing trespass for which the plaintiff has no adequate remedy at law. Plain-

[19] Seilheimer v. Seilheimer, 40 N. J. Eq. 412, 2 Atl. 376 (1885); *but cf.* Winner v. Winner, 171 Wisc. 413, 177 N. W. 680 (1920).

[20] Foss v. Foss, 12 Allen 26 (Mass. 1866).

[21] Herr v. Herr, 109 Pa. Sup. 42, 165 Atl. 547 (1916); Bryant v. Bryant, 171 N. C. 746, 88 S. E. 147 (1916); Mason v. Mason, 164 Ark. 59, 261 S. W. 40 (1924); Donovan v. Donovan, 263 N. Y. S. 336, 147 N. Y. Misc. 157 (1933); Santer v. Santer, 324 Pa. 140, 188 Atl. 531 (1936).

[22] 43 N. J. Eq. 473 at 477, 11 Atl. 426 (1887).